Chin Kam Peng v Datin Chan Wu Lee Yun & Ors

HIGH COURT (SEREMBAN) — CIVIL SUIT NO 22–59 OF 1995
AZHAR J
2 DECEMBER 2004

Land Law — Sale of land — Stakeholder — Stakeholder absconded with deposit and part payment — Whether loss to be borne by vendor

Contract — Sale and purchase of property — Deposit — Stakeholder — Stakeholder absconded with deposit and part payment — Whether loss to be borne by vendor

The defendants were the registered co-owners of two properties, ie CT 3197 lot 1626 and CT 8767 lot 3928 Mukim Rasah, Seremban, Negeri Sembilan ('the property'). By an instrument entitled 'Instruction To Secure A Purchaser For Our Properties' they appointed an agent, one Liew Ah Kow ('Liew') of NS Properties, who secured the plaintiff to agree to buy both properties for RM450,000. Consequently, the plaintiff paid RM90,000 to a firm of solicitors, ie Francis Yong & Co ('the solicitors') as deposit and part payment towards the purchase price. The solicitors absconded with the deposit, and the defendants refused to complete the transaction. The plaintiff applied to this court for a declaration that there was an agreement between the parties and for specific performance of the agreement. The defendants' contention was that the purchaser's solicitors was not a stakeholder and that there was no agreement.

Held, allowing the plaintiff's claim:

(1) The agreement prepared by the solicitors, though not legally executed, was indicative of what the parties' intention. This is fortified by cl 6 of the intended agreement which entitled the vendor to forfeit the deposit paid by the plaintiff in the event that the purchaser fails to pay the balance of purchase price. Therefore, the solicitors concerned was, for all intents and purposes, a 'stakeholder'. When a stakeholder misappropriates the money, the vendor bears the loss even though the solicitor was appointed by the purchasers (see para 25).

(2) On the contention that there was no formalised agreement to be enforced against the defendants, the parties had entered into an initial contract wherein the plaintiff had performed her side of the bargain while the defendants had wilfully neglected to perform theirs. This tantamount to a clear breach on their part. (see paras 31 and 32); *Ayer Hitam Tin Dredging Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 followed.

[**Bahasa Malaysia summary**

Defendan-defendan adalah pemilik berdaftar bersama bagi dua hartanah, iaitu CT 3197 lot 1626 dan CT 8767 lot 3928 di Mukim Rasah, Seremban,

Negeri Sembilan ('hartanah tersebut'). Melalui instrumen berjudul 'Arahan Untuk Mendapatkan Pembeli Bagi Hartanah Kami', mereka melantik seorang agen, Liew Ah Kow dari NS Properties, yang telah mendapatkan plaintif untuk bersetuju untuk membeli kedua-dua hartanah dengan harga RM450,000. Kemudiannya, plaintif telah membayar RM90,000 kepada suatu firma guaman, iaitu Francis Yong & Co ('peguam cara tersebut') sebagai deposit dan bayaran separuh terhadap harga beli. Peguam cara tersebut telah melarikan diri dengan deposit tersebut dan pihak defendan enggan menyempurnakan transaksi tersebut. Plaintif memohon ke mahkamah ini untuk deklarasi bahawa sememangnya wujud suatu perjanjian di antara pihak-pihak dan untuk pelaksanaan spesifik perjanjian tersebut. Aduan pihak defendan adalah bahawa peguam cara pembeli bukanlah pemegang amanah harta dan tidak terdapat apa-apa perjanjian.

Diputuskan, membenarkan tuntutan plaintif:

(1) Perjanjian yang disediakan oleh peguam cara tersebut, walaupun tidak disempurnakan secara sah, menggambarkan niat pihak-pihak berkenaan. Ini diperkukuhkan melalui kl 6 perjanjian yang diinginkan yang membenarkan penjual untuk melucuthak wang deposit yang dibayar oleh plaintif jika pembeli gagal membayar baki harga pembelian. Maka peguam cara tersebut adalah, untuk segala niat dan tujuan, seorang pemegang amanah harta. Bila mana seorang pemegang amanah harta melarikan diri dengan wang berkenaan, penjual menanggung kerugian walaupun peguam cara berkenaan dilantik oleh pembeli (lihat perenggan 25).

(2) Berkenaan aduan bahawa tidak terdapat perjanjian yang formal untuk dikuatkuasakan terhadap defendan, pihak-pihak telah memasuki suatu kontrak permulaan di mana plaintif telah menyempurnakan apa yang diperlukan olehnya manakala pihak defendan dengan sengajanya telah mengabaikan kewajipan mereka. Ini merupakan suatu salah ingkar pada belah mereka (lihat perenggan 31 dan 32); *Ayer Hitam Tin Dredging Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 diikut.]

Notes

For cases on stakeholders involving sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 3801

Cases referred to

Ayer Hitam Tin Dredging Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor Haji Yaakob [2000] 4 MLJ 433 (refd)

OCBC Bank (M) Bhd v Lee Lee Fah & Ors [2000] 1 MLJ 134 (refd)

Thomson Hill Pie Ltd v Chang Erh & Anor [1992] 2 SLR 769 (refd)

Muhammad Hisham Segaran (Rajinder Singh with him) (Morthi, Segaran & Co) for the plaintiff
Asmawi Ismail (SF Leow & Co) for the first defendant
Gurdit Singh (RShan & Assc) for the second, fifth–eleventh defendants
KF Wong & Azmi Abdul Aziz (KF Wong & Lee) for the third defendant
A Dharssini (Krishna Dallumah) for the fourth defendant

Azhar J:

[1] The undisputed facts of this case are as follows.

[2] The defendants at the material time were the registered co-owners of properties particularly known as CT 3197 lot 1626 and CT 8767 lot 3928 Mukim Rasah, Seremban, Negeri Sembilan.

[3] By an instrument entitled 'Instruction To Secure A Purchaser For Our Properties' dated 25 October 1991, they appointed one Liew Ah Kow of NS Properties as their 'exclusive agent' to secure buyer for their above mentioned properties. Pursuant to this appointment, the said Liew Ah Kow (SP1) succeeded in getting a buyer, the plaintiff. As instructed by the defendants and agreed by the plaintiff, the sale price was RM450,000. Following that the plaintiff paid a total sum of RM90,000 to a firm of solicitors Francis Yong & Co as deposit and part payment towards the purchase price. It is evident that subsequent to the payment having been made, the solicitors concerned misappropriated the money and absconded. Consequently the defendants refused to go through the transaction. Hence this action, wherein the plaintiff prays, *inter alia*, for the following:

(a) Deklarasi bahawa memang wujud satu perjanjian di antara pihak plaintif dan pihak defendan-defendan;

(b) 'Specific performance' perjanjian antara pihak plaintif dan defendan-defendan;

(c) Ganti rugi bagi 'breach of contract';

(d) Satu deklarasi bahawa pihak plaintif berhak memasuki kaveat ke atas lot-lot tanah berkenaan.

[4] SP1 in his evidence for the plaintiff informed the court that following the plaintiff's offer to buy the properties from one of the co-owners Chan Ten Loy (now deceased) who acted on behalf of all the defendants, together with SP1 himself took the plaintiff to the office of Francis Yong & Co for the purpose of execution of the transaction.

[5] According to SP1 at the solicitor's office the plaintiff was introduced by Chan Ten Loy to a lawyer by the name of Francis Yong whom according to the said Chan Ten Loy had been unanimously appointed by all the defendants to act on their behalf in the transaction. At the lawyer's office the plaintiff was

informed that on the defendant's instruction the plaintiff was required to pay 20% of the purchase price. This, the plaintiff did. A payment of RM90,000 was made by cheque in favour of Francis Yong & Co. Subsequent to that on 24 January 1992, SP1 accompanied the plaintiff to Francis Yong's office. The plaintiff was told that the agreement had yet to be signed by some of the defendants. As such the plaintiff was advised by Francis Yong to lodge a caveat on the properties. To this end the lawyer offered his service and to do the necessaries and the plaintiff was charged RM300. A receipt for this payment was issued by the lawyer to the plaintiff. Subsequently, by a letter dated 19February 1992 Francis Yong & Co informed the plaintiff that the first defendant a personal representative of one of the co-owners would only sign the agreement upon getting a letter of administration in respect of the deceased co-owners estate.

[6] Then, by the solicitor's letter dated 21 July 1992 the defendants were asked to come to the lawyer's office on a fixed date, 25 August 1992, for the purpose of signing a sale and purchase agreement. In the said letter, the defendants were also advised that the paid deposit would only be released upon execution of the agreement by all the defendants.

[7] Subsequently SP1 accompanied the plaintiff for a further visit to Francis Yong's office to enquire about the status of the transaction. There they were shown by the lawyer a sale and purchase agreement that had been prepared and signed by six of the defendants. According to SP1, the lawyer informed them that the plaintiff would only sign after all the co-owners had put down their signatures on the agreement. As for the first defendant the plaintiff was informed that the former would sign a separate agreement upon getting leave from the court to sell the deceased's co-owners' 1/11th share in the properties.

[8] According to SP1 further, two weeks later he enquired from Chan Ten Loy about the agreement not having been signed by the rest of the defendants. SP1 was told that the owners of the properties were no longer interested in selling the lands at RM450,000 as earlier agreed, as there was already a new buyer who was willing to take properties at a higher price. It was also in the evidence of SP1 that according to Chan Ten Loy the deposit and part payment of the purchase price paid by the plaintiff had already been released by Francis Yong to the six co-owners who had already signed the agreement according to their respective portion.

[9] I now move on to the evidence of the plaintiff herself. In essence the evidence of the plaintiff was an affirmation of the evidence of SP1. She informed the court that prior to the transaction she did not know Francis Yong and it was Chan Ten Loy who introduced her to the lawyer. She categorically denied appointing Francis Yong as her solicitors in the transaction and explained further that the RM300 that she paid to the lawyer during her

subsequent visit to the lawyer's office was for professional fees for the lodgement of caveat over the properties in question which the said lawyer offered to do.

The Defence

[10] The crux of the defence of all the defendants was their denial that the solicitors Francis Yong & Co was appointed by them.

[11] The defendants' other line of defence was that the execution of the transaction was subject to a formal contract to be entered and signed by all parties. As this had not been done, it was argued that the initial oral agreement was not binding and unenforceable against the defendants.

[12] The defendants further denied giving any representative capacity and authority to Chan Ten Loy to act on their behalf in the transaction. Lastly, the defendants denied knowledge of any money been paid to Francis Yong by the plaintiff and receipt of any payment from the lawyer.

The Decision

[13] From the evidence, in particular exh P1, it is crystal clear that all the defendants including the first defendant who had held out herself to be administrator of the estate of Dato' Chan Foo Yew @ Chan Chew Sen 'the deceased' in the said P1 had unanimously agreed to appoint SP1 as their agent in securing a purchaser for the properties in question on terms and conditions stated in the letter of appointment. It is to be noted that the authenticity and contents of P1 went unchallenged except for the capacity of the first defendant which the counsel argued she did not have. With respect, this contention is unsustainable. As mentioned earlier, in signing P1 the first defendant represented herself to be the administrator of her husband's estate. As such she is estopped from denying and derogating from what she had represented herself to be.

[14] On the contention that the first defendant signed P1 as a result of pressure and undue influence that came from Chan Ten Loy there was no evidence to support this. On the above premises it is the finding of this court that the letter of instruction to SP1 was signed by the first defendant with full knowledge and on her own free will.

[15] From the evidence of the plaintiff and that of the defendants, a firm deduction can be made that Chan Ten Loy had played active roles in the transaction. Support to this can be found in the first defendant's own evidence that the said Chan Ten Loy had asked her to sign a letter of instruction to SP1 (P1). As such the persons who can be said to have first hand knowledge of what had transpired during negotiations in the transaction were the plaintiff, SP1 and Chan Ten Loy.

[16] None of the defendants had any knowledge of what had taken place during the negotiations. This has been conceded to and admitted by counsel for the fourth defendant in his submission.

[17] It is also evident that the only person who knew what had taken place and transpired at the lawyer's office were the three above mentioned persons. None of the other defendants had any personal knowledge of what had been discussed and agreed at the lawyer's office. The defendant's evidence on this aspect to my mind is nothing more than conjectures.

[18] However, in evaluating the evidence adduced by the plaintiff I always have in the forefront of my mind the principle laid down by the Court of Appeal in *Guan Teik Sdn Bhd v Haji Mohd Noor Haji Yaakob* [2000] 4 MLJ 433, that the court has also to look at all the surrounding factors and weigh and evaluate the contemporaneous documents that may tend to establish the truth or otherwise of a given fact.

[19] Perusing the evidence adduced in the trial it is apparent that the plaintiff had made payment of RM90,000 to the lawyer. This payment, as it was shown in the official receipt P2 was for 'deposit and part payment towards purchase of CT 5197 lot 1626 and CT 8767 lot 5928 Mukim Rasah'. Amply, this is an evidence to support the plaintiff's contention as well as the evidence of SP1 that there was an oral agreement between the plaintiff and Chan Ten Loy. Clearly this payment was made by the plaintiff pursuant to the agreement that he had with Chan Ten Loy. This evidence is to be found in the testimony of SP1 and the official receipt P2. The defendants were in no position to deny this for reasons stated earlier. For the reasons above mentioned, it is the finding of this court that there was an initial oral agreement between the plaintiff and Chan Ten Loy respecting the sale and purchase of the properties. By reason of P1 the said agreement would necessarily bind the rest of the co-owners of the lands. From the evidence before the court, it can be safely inferred that the parties had intended the oral agreement to be formalised by all parties signing a written agreement.

[20] Following the events that took place subsequent to the payment of the RM90,000 to the solicitors which was the abscondment of Francis Yong, it was submitted by counsels for the parties that the central issue that needed to be determined was the capacity of Francis Yong in the transaction; whether he was acting for the plaintiff or for the defendants'.

[21] Counsels for the defendants in their submissions had jointly and in one voice urged this court to hold that Francis Yong was appointed by the plaintiff for the following reasons:

i) Francis Yong's letter dated 27 November 1992 (D8) indicated that the lawyer was acting for the plaintiff;

ii) Use of phrase that 'we wish to advise that …' in Francis Yong's letter to the plaintiff (P4);

iii) Payment of RM300 for the lodgement of caveat to the lawyer by the plaintiff;

iv) P2 did not indicate that the payment of RM90,000 was made to Francis Yong as stakeholder.

[22] For convenience I will first deal with grounds (ii), (iii) and (iv). As for ground (ii), the usage of the phrase 'we wish to advise', is no clear indication that the lawyer was acting for the plaintiff. If this were to be interpreted in the manner suggested by the counsel, then we have also to look at the letters P5A-J. Reading the said letters as a whole it appears that the writer (the lawyer) had received the instruction as imparted in the said letters, from Chan Wu Lee Yun, the first defendant.

[23] As for ground (iii), it has been clearly and logically explained by the plaintiff that the said payment of RM300 was for the service rendered by the lawyer in respect of the lodgement of the caveat by the plaintiff. If the lawyer were to act for the plaintiff in the transaction, in all probabilities the payment of RM300 would not come in a separate bill, but would be included in a master bill at the conclusion of the transaction.

[24] As for ground (iv) the intention of the parties with regard to the status of the lawyer it had been expressed and manifested in the intended agreement P6. In particular para 11 of the schedule of payment which *inter alia* read:

> … provided always that if the loan approved is less than the balance purchase price, the purchaser shall on before the completion date pay to the said solicitors as *stakeholders* the difference between the balance of purchase price and the loan.

[25] The agreement though not legally executed, is indicative of what the parties had intended to contract. To further fortify this finding one has only to look at cl 6 of the intended agreement. Under this clause the vendor was entitled to forfeit the deposit paid by the plaintiff in the event that the purchaser shall fail to pay the balance of purchase price. By reasons of the above mentioned it is the finding of this court that the lawyer concerned for all intents and purposes was a 'stakeholder'.

[26] Reverting back to ground (i), this court's attention was drawn to a Court of Appeal decision in *OCBC Bank (M) Bhd v Lee Lee Fah & Ors* [2000] 1 MLJ 134. It was, *inter alia*, decided in that case:

> The position of a 'stakeholder' in a sale and purchase agreement is clear. The purchaser, having deposited the money with the stakeholder, if he changes his mind cannot demand the stakeholder to hand over the money to him without the consent of the vendors for his benefit it was deposited. This is so even if the stakeholder is appointed by the purchaser.

[27] Siti Norma Yaacob JCA, in concurring with Shaikh Daud Ismail JCA's decision as above, had this to say:

> The contention that since the stakeholder was the company's own solicitors the company must therefore be liable to make good the loss suffered by the respondent is misplaced. We are not concerned here with the appointment of M/s Francis Yong, Sulastry & Co as the company's solicitors, but with their appointment as stakeholder, an appointment that had been mutually agreed to by the company and the respondents.

[28] I am further attracted to a decision of Singapore Court of Appeal in a case referred by counsel for the plaintiff. In *Thomson Hill Pte Ltd v Chang Erh & Anor And Another Appeal* [1992] 3 SLR 769, it was decided as follows:

> When the solicitor who is a stakeholder misappropriates the money the toss must fall on the vendor's even though the solicitors was appointed by the purchasers. This is because the true position in law is that by mutual consent the parties have made the purchasers' solicitor the stakeholder. The fact that the particular solicitor was appointed by the purchasers as their solicitor was immaterial. The loss must be allowed to remain where it falls.

[29] So much on the issue of stakeholder. I now move on to consider the defendants' other lines of argument. It was contended for the defendants that there was no valid agreement in existence as the plaintiff had refused to sign as evidenced in P8. My view to this contention is simply this. For anyone to contend and suggest that the plaintiff was reluctant to sign the agreement is tantamount to going against the grain of evidence. There is evidence before the court that the plaintiff had paid a deposit and part payment of RM90,000. There is also evidence from the plaintiff and SP1 that the plaintiff was advised by the solicitors that the plaintiff would only sign the agreement after the vendors had put down their signatures. Then there is also evidence before the court that the lawyer had sent out letters dated 21 July 1992 (P5A–J) to all the defendants requesting them to call at the lawyer's office to sign the sale and purchase agreement. Only six of the defendants responded while others failed to turn up. According to SP1, Chan Ten Loy had informed him that the defendants were no longer interested to complete the agreement because they had themselves found a new buyer who was prepared to pay a higher price.

[30] Thus, it is apparent that the non-execution of P6 was due to the neglect and reluctance of the other defendants to sign.

[31] On the contention that there was no formalised agreement to be enforced against the defendants, this court is guided by and takes the cue from a Supreme Court decision in *Ayer Hitam Tin Dredging Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 wherein the court *inter alia* decided as follows:

> 1) The existence of an agreement depends upon the intention of the parties, who must be *ad idem*. It may be inferred from the language used, the parties'

conduct having regard to the surrounding circumstances and the object of the contract. The court will generally apply an objective or reasonable man test. A

2) Merely because the parties contemplate the preparation of a formal contract, that would not prevent a binding contract from coming into existence before a formal contract is signed ... .

[32] In the instant case, taking all the evidence into consideration, it is inevitable that this court comes to an irresistible conclusion that the parties had entered into an initial contract wherein the plaintiff had performed her side of the bargain while the defendants had wilfully neglected to perform theirs. This is a clear breach on their part. B

[33] Lastly on the issue of laches. Records show that this action was filed by the plaintiff three years after the payment of the deposit by the plaintiff. In the meantime the plaintiff was given to understand that two of the defendants were in the process of applying for letters of administration in respect of their respective husband's estate. If this period of time were to be considered as delay in taking this action, such delay is partly attributed to the defendants themselves. Therefore the defendants' argument is unsustainable. C D

[34] For reasons stated above, it is the finding of this court that the plaintiff's claim should be allowed as prayed.

Plaintiff's claim allowed. E

Reported by AG Kalidas

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